IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1505

MARSHALL P. SAFIR,

Petitioner,

—vs.—

JUANITA M. KREPS, Individually, and as Secretary of Commerce, et al.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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TABLE OF CONTENTS

TABLE OF CASES

STATUTES CITED

OTHER AUTHORITIES

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Petitioner prays that a writ of certiorari issued to review the judgment of the United States Court Appeals for the District of Columbia Circuit entered in the above-entitled case on February 11, 1977 (Appendix A, page 1a).

Opinions Below

Investigation of Alleged Section 810 Violation, 12 SRR 1105 (Rec. Dec. 1972); *Investigation of Alleged Section 810 Violation*, 13 SRR 809 (MSB, 1973); *Safir* v. *Dent*, No. 74-1716 (D.C. Cir.); *Safir* v. *Gibson*, 417 F.2d 972 (2d Cir., 1969); *Safir* v. *Gibson*, 432 F.2d 137 (2d Cir., 1970), *cert. den.*, 400 U.S. 850 (1970); *Safir* v. *Gulick*, 297 F. Supp. 630 (E.D.N.Y., 1969).

Jurisdiction

The judgment of the Court of Appeals in Safir III was entered on February 11, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Statutes

(a) Merchant Marine Act, 1936 as amended (hereafter MMA '36) 49 Stat. §§ 1985ff, 46 U.S.C. 1101ff, particularly Sec. 501(a) 46 U.S.C. § 1152 authorizing the payment by the United States under certain conditions of Construction Differential Subsidy for construction of merchant ships for American Registry; § 601, § 602, and § 603, 46 U.S.C. 1171, 1172, 1173, authorizing payment under certain conditions of operating differential subsidy for the operation of such ships and *most particularly* sec. 810, 46 U.S.C. 1227 mandating the bar of all subsidy payments to violators of said section.

(b) The act originally known as the False Claims Act RS § 3490; 5348; 31 U.S.C. § 231, § 232.

(c) Administrative Procedure Act, 5 U.S.C. § 551ff [hereafter (APA)] particularly sec. 7-5 U.S.C. § 553, § 556(e) requiring rules and orders to be based on the record and supported by and in accordance with the reliable probative and substantial evidence and sec. 10e 5 U.S.C. 706 requiring the reviewing Court to compel agency action unlawfully withheld and to hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, short of statutory right, unsupported by substantial evidence or without observance of procedure required by law.

Section 810, Merchant Marine Act 1936:

> "It shall be unlawful for any contractor receiving an operating-differential subsidy under title VI or for any charterer of vessels under title VII of this Act, to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.
>
> "No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section. Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Questions Presented

I.

Whether, after affirming the determination of the Maritime Subsidy Board in Docket S243 that Section 810 of the Merchant Marine Act, 1936 had been violated, the Secretary of Commerce has discretion consistent with the statute to seek recovery of less than the sum total of all public subsidy monies claimed by the offending recipient

contractors during the 11 month period of violation and improperly paid under Titles V and VI of the Act.

II.

Whether it is within the discretion of the Secretary to refuse to implement the operating differential subsidy agreement articles II-21(f), II-30 and II-31 (withholding subsidy and declaring carriers in default) and to refuse to refer the case to the Attorney General to seek recovery of the construction differential subsidy and operating differential subsidy falsely claimed and illegally paid out without considering the competitive interest of a relator-victim under Title 31 U.S.C. 231, 232, 235.

III.

Whether the discussion in Safir III by the District of Columbia Circuit misconstrued the meaning of the footnote in the Second Circuit decisions in Safir II and Safir IIa as power to mitigate and collect "penalties" instead of discretion to investigate and recommend action to recover subsidies.

IV.

Whether the decision in Safir II in the Second Circuit distinguishing current payments from past recoveries was an erroneous estoppel of the statutory duty of the Secretary of Commerce under Section 810 and his power under the Operating Differential Subsidy Agreement (O.D.S.A.) articles, *supra*, to withhold subsidies from the carriers in default, refer to Department of Justice for prosecution and await final adjudication and recovery on behalf of the United States and the relator-victim before resuming payments?

Statement of the Case

This single continuing dispute has been at issue, in one context or another, for more than a decade. In addition to

prior proceedings in this Court and the court below, one or another aspect of this litigation has been passed on by the Federal Maritime Commission, the Maritime Subsidy Board/Secretary of Commerce, the United States District Court for the Eastern District of New York (on five separate occasions), and the United States Court of Appeals for the Second Circuit (on five separate occasions), and the dispute has been before the Supreme Court on petition for writ of certiorari twice by this petitioner and once by the intervening carriers.

A. The Parties

1. Petitioner, Mr. Marshall Safir, plaintiff below, was an owner in Sapphire Steamship Lines ("Sapphire"), a steamship company incorporated in 1965. Sapphire provided service between United States Atlantic and Gulf ports and ports in the United Kingdom and Bordeaux-Hamburg range in Europe.[1]

2. *AGAFBO.* Atlantic and Gulf American Flag Berth Operators ("AGAFBO") was a conference of United States-flag ocean carriers, approved pursuant to § 15 of the Shipping Act, 1916, 46 U.S.C. § 814, and authorized to negotiate rates with the Department of Defense for ocean carriage of military cargoes between United States Atlantic and Gulf ports and all foreign ports to which military cargoes were transported. Virtually all United States-flag ocean carriers serving any of those trades were members.[2] The AGAFBO members were about evenly divided between subsidized carriers—those which were parties to an operating-differential subsidy agreement under Title VI of the Merchant Marine Act,

[1] See MSB Docket S-243, *Investigation of Alleged Section 810 Violation*, 12 SRR 1105, 1108-09, 1111 (Rec. Dec., 1972). Throughout this petition, where reference is made to maritime decisions which have not yet been officially reported, the citation is to Pike and Fischer Shipping Regulaton Reporter, identified as "SRR."

[2] See FMC Docket 65-13, *Rates on U. S. Government Cargo*, 11 FMC 263, 264-266 (1967).

1936, 46 U.S.C. § 1101 *et seq.*—and non-subsidized carriers.

3. *Trade Lines.* Throughout this litigation the term "trade lines," most broadly, has had reference to those AGAFBO members which provided service between United States Atlantic and Gulf ports and ports in the United Kingdom and Bordeaux-Hamburg range. In proceedings under § 810 the term "trade lines" has had a narrower meaning, applying only to the *subsidized* AGAFBO carriers in that trade—American Export Lines, Bloomfield Steamship Co., Lykes Bros. Steamship Co., Moore-McCormack Lines, and United States Lines, Inc.

4. *Non-trade Lines.* The term "non-trade lines," during this litigation, has identified those AGAFBO members which did *not* during the period of violation provide service between United States Atlantic and Gulf ports and ports in the United Kingdom and Bordeaux-Hamburg range. In proceedings under § 810 the term has identified the *subsidized* non-trade lines, and it will be so used here. These carriers were also found to have violated the act by the MSB. This finding was affirmed by the Secretary of Commerce on review.

5. *Public Defendants.* In addition to the able new Secretary Kreps, the public officials against which these proceedings have been brought over the past decade have included three Secretaries of Commerce (Messrs. Dent, Stans and Smith) and the last three Shairmen of the Maritime Subsidy Board (Messrs. Gulick, Gibson and Blackwell). Except where the context requires otherwise, we will use the term "Secretary" to refer not only to the Secretary of Commerce but also to his delegates, the Maritime Subsidy Board and Maritime Administrator.[5]

[5] The current delegation of authority is contained in Department of Commerce Organization Order No. 10-8, 38 Fed. Reg. 19707.

B. Federal Maritime Commission Docket 65-13

The pending dispute has its origins in a series of rate reductions on military cargo moving between U. S. Atlantic and Gulf ports and ports in the United Kingdom/Bordeaux-Hamburg range which were put into effect by AGAFBO in 1965. The reductions were designed to destroy Sapphire, which had just entered that trade. The reduced AGAFBO rates were maintained for 11 months, and were terminated March 1, 1966.[4] Their legality was among the matters considered by the Federal Maritime Commission in its FMC Docket 65-13, *Rates on U. S. Government Cargo*, 11 FMC 263 (1967), an investigation "of virtually the entire spectrum of practices surrounding the procurement of ocean transportation of U. S. military cargoes." 11 FMC at 264. The Commission also considered charges by Sapphire that a variety of additional actions alleged to have been taken by AGAFBO or its individual members to discourage the Sapphire service were in violation of the governing AGAFBO agreement, or the provisions of the Shipping Act, 1916. *Id.* at 280 *et seq.* The Commission decided (i) that "AGAFBO's rates * * * were reduced to an admittedly noncompensatory and unreasonable level in an attempt unfairly to compete with Sapphire [and] were so unreasonably low as to be detrimental to the commerce * * * *"; (ii) that the rate action was in result a violation of §§ 15 and 18(b)(5) of the Shipping Act, 1916, 46 U.S.C. §§ 814, 817.

C. Safir I

Safir v. *Gulick*, E.D. N.Y. Civil No. 68 C 643, was an action filed by Mr. Safir in the United States District Court for the Eastern District of New York against the

[4] See *Rates on U. S. Government Cargo*, 11 FMC 263, (1967).

Acting Maritime Administrator and the Secretary of Commerce. The complaint was filed several months after the Federal Maritime Commission (which is wholly independent of the Secretary, and administers a separate statute) had issued its Docket 65-13 decision. The complaint, reciting that it was based on § 810, sought the following relief in implementation of the FMC Docket 65-13 findings that the United Kingdom/Bordeaux-Hamburg rate reductions had been unfair to to Sapphire:

> "A. A judicial declaration adjudicating that the making of any subsidy payment of any kind out of the funds of the United States to the carriers who were members of AGAFBO during the time period covered by the decision of the Maritime Commission, Docket No. 65-13, is illegal in violation of 46 U.S.C. 1227;
>
> "B. That an order of prohibition be issued prohibiting and enjoining the defendants from continuing to make such subsidy payments;
>
> "C. That an order be issued directing the defendants to commence appropriate legal action to recover the subsidy payments heretofore illegally made; * * * "

The District Court dismissed on the dual grounds that Mr. Safir lacked standing to bring suit, and that the actions sought to be compelled—the prohibition of payment of subsidy for the future, and the collection of subsidy paid in the past—were within the unreviewable discretion of the Secretary. *Safir* v. *Gulick*, 297 F. Supp. 630 (E.D.N.Y. 1969). The Second Circuit reversed the dismissal, ruling that the Secretary's discretion under § 810 was not unlimited and that Mr. Safir did have standing to compel the Secretary to act. The Second Circuit interpreted § 810 (i) to *require* the Secretary to discontinue *current* payments of subsidy during a period

of *continued* violation of § 810, and (ii) to *authorize* the Secretary, to recover subsidy paid during the period of violation which had occurred in the past. Furthermore, he could not refuse to seek recovery without considering the interest of the victim. *Safir* v. *Gibson*, 417 F.2d 972 (2d Cir. 1969).

D. Safir II

Without awaiting instructions the Maritime Subsidy Board initiated a proceeding, denominated MSB Docket S-243, for the stated purpose to "compile a public record 'which will provide a basis for recommending to the Maritime Subsidy Board whether Section 810 * * * has been violated and the appropriate action that should be taken.'" *Safir* v. *Gibson*, 432 F.2d 137, 140 (2d Cir. 1970). Docket S-243, which is under review in the present action, will be discussed under the next heading of this memorandum. Its relevance at this point results from the fact that once the Board's Order of Investigation was issued petitioner returned to the Eastern District with the claim that the Secretary was disregarding the Second Circuit ruling by initiating the proceeding. Petitioner's demand was that the Secretary immediately be enjoined from making any further payments of subsidy to the subsidized AGAFBO lines. The injunction was denied, and that ruling was affirmed by the Second Circuit on review. *Id.*

But when the case came before it this second time, the Second Circuit also undertook to analyze the legal significance of the Commission's Docket 65-13 findings in the pending MSB Docket S-243 proceeding, and ruled that the Commission findings that the AGAFBO rates were unreasonably low and unfair to Sapphire compelled, on principles of collateral estoppel, that the Secretary also find that the rates were "unjustly discriminatory and

unfair" to Sapphire within the meaning of § 810 and conclusive of violation if the victim met certain criteria (*infra*). The Second Circuit, speaking through Judge Friendly, to assure procedural due process footnoted:

> "Nothing we have said should be read as preventing the Maritime Administration from investigating the nature and extent of the individual carriers' participation in the illegal action, should it find these matters relevant to its ultimate decision of whether to seek recovery of subsidies paid during the violation and, if so, how much and from whom." 432 F.2d 137 at 145, n. 2.

E. Safir II 2A

The trade and non-trade lines were granted permission to intervene following the decision in Safir II for the purpose of filing a petition for rehearing. This petition was then denied on the grounds that the footnote in Safir II would give them a forum to defend themselves as it would give the government an opportunity if desired to investigate whether a wider conspiracy existed. See appendix S, page 201A. This decision clearly granted to the agency the finding of fact but in no way could be read as abdicating the courts power under the law-fact distinction.

Mr. Safir sought Supreme Court review of the Second Circuit decision by writ of certiorari. This was denied, as was a conditional cross-petition filed by the carriers. 400 U.S. 850, 942. Mr. Justice William O. Douglas was of the opinion that certiorari be granted in the Safir petition at that time. There was no public comment by the Court on the cross-petition wherein the carriers challenged the collateral estoppel effect of the FMC action on Section 810 and which was denied at a later date.

F. MSB Docket S-243

The Maritime Subsidy Board began its Docket S-243 investigation in October, 1969. Petitioner, as well as all subsidized AGAFBO carriers, were named parties. A lengthy hearing was conducted before the Board's Chief Administrative Law Judge who, in a Recommended Decision served April 24, 1972, found all of the *trade* respondents—those serving the United Kingdom/Bordeaux-Hamburg range in which Sapphire operated—to have violated § 810 during the 11-month period in 1965-1966 when reduced rates were maintained in the United Kingdom/Bordeaux-Hamburg range. He recommended recoveries totalling approximately $10 million.

The Board's Opinion and Order on exceptions from the Recommended Decision was issued April 16, 1973. The opinion affirmed the finding of violation by the trade lines and, subject to audit and verification, assessed a recovery of subsidy against them which, in aggregate, totaled slightly less than $2.4 million. This assessment was substantially less than the subsidy paid to the lines for that 11-month period of the violation and, for each individual line, was based on an appraisal of the nature of that line's participation in the illegal activity as well as of other mitigating factors of record. With respect to the non-trade lines, the Board reversed the Administrative Law Judge and found that the non-trade lines had indeed violated the Act but recommended no penalties against them under a mitigation theory that these lines had not participated in the illegal rate conduct.

The Board's April 16, 1973, Opinion and Order was made final by action of October 10, 1973. [14 SRR 77] Petitions for review of the Board decision were filed by

the lines with the Secretary of Commerce pursuant to Department of Commerce Order 10-8, 46 C.F.R. Part 202. The Secretary declined to reverse the Board determination insofar as it affected the nontrade lines culpability.

G. Additional Litigation by Petitioner To Compel Agency Action

In addition to the proceedings already identified, Mr. Safir, on five separate occasions during the pendency of Docket S-243, moved either in the Eastern District of New York, directly in the Second Circuit, or in the United States District Court for the District of Columbia to have continued payment of operating-differential subsidy to the trade and non-trade lines enjoined, or to have review on an interlocutory basis of the decision of the Maritime Subsidy Board that it would not require recovery from those lines of the entire subsidy paid to them for the 11-month period. Petitioner consistently claimed, as he claims here, that § 810 imposes an inflexible requirement for recovery of all subsidy received by a line on account of operation during the past period of § 810 violation.

1. *In the Eastern District of New York.* Three of the proceedings were brought in the Eastern District of New York. A petition filed with the Eastern District in June of 1971 sought an injunction barring the Secretary from disbursing subsidy to the trade and non-trade lines out of funds which had been made available by the Congress in a supplemental appropriations bill, P. L. 92-18, designed to liquidate a large accrued subsidy liability to the subsidized lines. *This petition was granted as to*

those funds which pertained to the eleven-month period. The June 22, 1971 order of the Eastern District which did require the Secretary, in the alternative, to withhold any additional payments of subsidy applicable to the operative 11-month period in 1965-1966, or to obtain sufficient security for recovery of such additional payments, until the Secretary had made his underlying determination of whether to recover subsidy for that period. 330 F. Supp. 225 (E.D.N.Y. 1971) was dissolved in October, 1974, following the Secretary's final decision in Docket S-243, on ground that "[t]he required informed decision of record has now been made." An attempt by the defendants to dismiss District Court E.D.N.Y. 68 C 643 in 1975 was denied. This forum remains open.

2. *In the Second Circuit.* In April of 1973, after the Board had issued its Opinion and Order, but before the Board had issued its supplemental and final order, Mr. Safir "moved" directly in the Second Circuit for an order reversing and setting aside the Board action insofar as it failed to require recovery of all subsidies accruing to the trade and non-trade lines for the 11-month period of the United Kingdom/Bordeaux-Hamburg rate reductions. The motion was grounded on the claim that § 810 imposes an absolute obligation on the Secretary to recover those subsidies. This motion was denied without opinion, and a petition to the Supreme Court for a writ of certiorari was also denied. 414 U.S. 975. The Solicitor General Bork argued that review was premature (see App. L, p. 93a) as the process of administrative exhaustion was not final at that stage.

3. *In The District of Columbia.* Finally, following the Board's final opinion, but while the proceeding was pending on review before the Secretary of Commerce,

Petitioner filed an action to review the Board decision in the United States District Court for the District of Columbia, D.C.D.C. Civil Action No. 2156-73. That complaint was dismissed as premature by Judge Corcoran. The Secretary's Order of September 9, 1974 finally issued which set the stage for the judicial review.

This was an action by petitioner against the Secretary to review the MSB Docket S-243 decision and to order the Secretary to recover all subsidies paid to both the trade and non-trade lines for the 11-month period in 1965-66 during which, it was found by the Board, they had violated § 810. Both the trade and non-trade lines were granted permission by the court below to intervene in the action as defendants. D.C.D.C. No. 74-1474, Order of March 3, 1975. In addition, the trade and non-trade lines each have filed separate actions against the Secretary, in which the carriers contend that the findings that they have violated § 810 are wrong. Complaints, D.C. D.C. Civil Action Nos. 74-1788, 75-0077. These later actions were stayed by the District Court pending decision on petitioner's appeal to the District of Columbia Circuit. Plaintiffs in those actions indicated to the District Court their intention to dismiss those actions if the decision was affirmed in the Circuit Court.

The proceeding came before the District Court on Petitioner's motion for summary judgment seeking a determination that the Secretary must recover all subsidies paid the trade and non-trade lines for the period of the § 810 violation, and on cross-motions by the Secretary, the non-trade lines, and the trade lines seeking dismissal of the complaint. The District Court denied petitioner's motion, granted the cross-motions, and dismissed the complaint. The Court of Appeals reversed in part and remanded the case to the District Court (Appendix A).

H. Safir III

I. The Footnote Was Misinterpreted

The plain truth is that misinterpretation of a single footnote in Safir II has caused the decision-making process to collapse into an absurdity, which Judge Wright recognizes in Safir III when he states that the actions of the Secretary of Commerce "gives little assurance that we have been presented with an order resulting from a reasoned decision making process." (Appendix A, p. 17a).

The footnote from Safir II, states:

"Nothing we have said should be read as preventing the Maritime Administration from investigating the nature and extent of the individual carrier's action, should it find these matters relevant to its ultimate decision on whether to seek recovery of subsidies paid during the violation and, if so, how much and from whom." (Appendix V, p. 220a).

This footnote has been seized upon by the Maritime Administration, the Secretary of Commerce and counsel to the subsidized lines as the discretionary escape hatch from the draconian probability inherent in the literal meaning of the statute itself. And petitioner admits that his own erstwhile counsel construed the footnote in like manner in his first petitior to this Court 388-1970 400 U.S. 850, *cert. denied.* The interpretation is wrong. The troublesome footnote, as will be seen below, ironically became the trap into which the "non-trade" lines have now been ensnared in the finding of violation when in Safir II-A, following a restatement of the footnote, the Court suggested as follows:

> "On the other side, the government is fearful lest the 'tenor of the opinion and the rationale un-

derlying it would appear to foreclose the Maritime Subsidy Board from investigating and concluding, contrary to a majority of the FMC that a wider conspiracy existed.

But, there was no 'majority' finding on the issue of a wider conspiracy since the four participating members divided 2 to 2. The issue, therefore, remains 'open.'" (Appendix S, p. 204a).

It was this footnote grant of discretion to facilitate procedural due process on the questions of fact that has emboldened those who would eviscerate section 810 to make claim that the judicial questions were abdicated to the purview of the administrative body (*NLRB* v. *Hearst Publications*, 322 U.S. 111, 136), and where the administrative body could afford to come to grips with the difficulty in the evidence that the non-trade lines violated the act because the embarrassing fact could be mitigated to a point of near exoneration.[4]

And yet, the learned Judge Wright, in assessing the footnote and questioning both the rationale for and the legality of an order of the Second Circuit to adjudicate what Judge Friendly characterized as a contract dispute, took this footnote as a valid foundation for the denial of petitioner's motion for summary judgment by Judge Bryant D.C.D.C. (Appendix A, p. 13a) on the theory that the footnote in some way made the right to mitigate recovery a discretionary grant by the Second Circuit. Petitioner finds it difficult to cast stones when his own misreading had permitted counsel for the non-trade lines

[4] It is noted that the Court's opinion on page 3a erroneously uses the term "exoneration" of the non-trade lines. They were not exonerated, they were mitigated.

in the court below to nurture the misreading without rebuttal.

Mitigation of recoveries is promulgated to be acceptable because it was granted by Judge Friendly's decision in Safir II. This position is at odds with the MSB admission that the Second Circuit did not make any definite finding regarding any discretion in connection with past violations. See MSB final order, Appendix N, page 125a.

Neither the Administrative Law Judge, nor the MSB when they embarked on their discretionary course, felt themselves as secure as Judge Wright's opinion would lead one to believe they should have felt. The remand of docket 74-1474 to the District Court would create an article III forum for this petitioner, to be sure, but one in which he would be enmeshed in a review bounded on one side by the capriciousness of the former Secretary of Commerce whose recovery recommendation represents one-half of one percent of the subsidies paid out during the period of violation and, on the other hand, by an Administrative Law Judge whose "harshness" called for a recovery of a mere five percent of the subsidies paid out during the eleven-month period of violation.

The transitory significance of the footnote as a grant of discretion to the exercise of irresponsible mitigation is contained in a colloquy which took place on October 4, 1974 before Judge Dooling of the Eastern District of New York about one month after Secretary Dent's decision. The Department of Justice moved for an order relieving the government from further restraint of the District Court's injunction of June and Judge Dooling was discussing his reasons why the injunction would be vacated:

The Court: You see—I take it that the Secretary's action does comply with what was the point of my original determination. In other words, with the right clearly in mind, and after full administrator review, he has decided that this is not an all right amount. And what I was concerned with and the only reason for having granted the injunction was that that critical administrative step had never been taken.

In other words, that the Government has never reverted to it's right under Section 8, whatever it is—

Safir: 810.

The Court: Until they learned from Chief Judge Friendly that they had the right. And then it was too late because they had already granted the subsidy. If this was in a way a reconsideration of the grant of subsidy after full review and in the light of the demonstrated violations of law, *so now he's done it, if he is wrong, well, he's no wronger than a Public Officer usually is, but he's not entitled to secure himself. Nor is the Government entitled to be secured against the possibility that it may have failed to be generous enough to itself.*

Fleischer: Yes, I understand what you are saying. I do feel, unless you can correct me, your Honor, that he has a right that he is asking for right now in your decision itself. You did not order him not to pay out, you just said don't pay out unless you've made a decision, and in which case on straight grounds as to why you made it. And so that there is no requirement really for him to come into your Courtroom and ask for relief at this particular time.

The Court: Except as Mr. Felischer [sic] pointed out, what with the way things have been going recently he was not of a mind to run the risk that I might think he should have.

Safir: Well, once you disabused him of that—

The Court: I think that really is all he wants. So I think my decision would have to be that the net payment can be made and that you will have to go to whoever succeeds Judge Corcoran (phonetic) if he doesn't get it as a related case and be ready to go in there sometime Monday and get him to give you whatever threshhold relief he may think you are entitled to. And then at that time, tell him exactly how wrong I can get things out of this whole mess, this is the only thing that I did that was right and only temporarily right.

Safir: I wouldn't say that. I think you did a lot that was right and helpful to me. Even when you turned me down.

Another light cast upon the footnote is its dependence for significance on the relevancy of competitive behavior. In the Journal of Maritime Law and Commerce edition of October of 1970, it is stated coincidently by footnote:

> "The effect of an individual carrier's active participation or lack of it depends on the form which the violation takes. It is a violation of section 810 to 'continue as a party to . . . any agreement' which violates the act, supra note 1. Hence lack of active participation would be irrelevant if the non-participating carrier remained a party to the prohibitive agreement." (See App. X, p. 246a).

But in spite of this simple explanation, the one-sentence footnote in Safir II became for this petitioner a six-year sentence to a dilatory administrative proceeding whose basic legality is now being questioned in the District of Columbia Circuit.

Judge Wright takes cognizance in his evaluation of the present state of the case where on page 15a (App. A), of the instant decision, he questions the Second Circuit's acceptance of the administrative procedural prerogatives staked out by MARAD in Docket S-243 prior to Safir II and which created the forum for foot dragging via psuedo-formal adjudication (contrast *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975)). If no statutory provision exists which would authorize such a procedure, then all that was required by the administrator (Secretary) was an answer consistent with the statute confirming that this petitioner and his steamship line met the criteria in Safir II for the finding of a violation—"subject only to the proof that the AGAFBO Lines were receiving operating differential subsides at the time and the carrier adversely affected was "a citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port, or ports.'" Safir II, App. V, p. 213a.

If the District of Columbia Circuit had contoured the scope of administrative review, an answer by the administration to the District Court would not have taken six years and placed the statute of limitations on a false claims act recovery by the United States in jeopardy. (See petitioner's reply brief, Appendix C, pp. 47a-50a, 53a).[5]

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[5] *Templeton* v. *United States*, 199 F. Supp. 179-186, is pertinent here, but not dispositive if a conflict between the Circuits developed.

But, while the footnote was a non-statutory license for discretionary delay, the ultimate conclusions, the Board and later the Secretary, were faced with were inevitable. The "non-trade" lines were in violation of the statute with the trade members of AGAFBO because of the irrelevancy of the nature and extent of participation in light of the statutory language. The logic of the footnote # 54 in Exhibit X, p. 246a, *supra*, is clearly dispositive of the issue.

If the footnote in Safir II was irrelevant on the issue of fact, as it turned out to be, then the Safir III decision's reliance on its as a mitigative tool must fall. The issues of law were closely reserved to the Court in Safir I. "There may be other limits on his discretion" Safir I at 978. Nothing in an irrelevant footnote could be read to grant relevant power to seek lesser recoveries.

II. Recovery Of Public Subsidy Money Is Not A Forfeiture Or Penalty Of Moneys Earned.

Despite the use of the term "penalty" used by the Circuit Court of the District of Columbia in Safir III, recovery of subsidy illegally paid is not a penalty as section 810 is not a penal statute. It is a return to the United States Treasury of moneys falsely claimed by the violating carriers when they, without the consent or the knowledge of the government contracting authority (the Maritime Administration), abrogated their subsidy contracts and the statutory provisions of the Merchant Marine Act of 1936 establishing these contracts. At issue is the actual recovery of payments estimated to be in excess of $200,000,000 not as forfeits, not as fines, not as penalties, but as funds falsely claimed and improperly paid out.

The Maritime Administration, through its Chief of litigation, stated succinctly in Docket S-243 ". . . in the present case and notwithstanding the inclusion of the requirements of section 810 of the act in each and every subsidy agreement, the respondents did not request the contractual permission, but proceeded to effect rate reduction and to wage battle before the FMC. *Once the Board was involved, and only through the behest of Mr. Safir*, the respondents firmly denied to this date that rate actions are subject to the section. These distinctions are all too apparent. *What remains is a clear provision of the subsidy contract and an explicit statute both binding on the respondents as of the day they first began, without any overture to the Maritime Administration, the unlawful behavior.*"

Petitioner contends that all of such payments must be recovered and that there is no ability on the part of the administrator to waive this recovery. The Second Circuit in Safir I did not say "some of such payments", or "part of such payments". An attempt at administrative revision of this wording was thwarted by this petitioner when the first edition of the MSB decision in S-243 of April 16, 1973 was published, contrast Appendix G with the original printed prior to petitioner's protest (Appendix H) as to the words "all or part" in footnote 58. This sly pattern of legal revisionism was not reserved to the printer of the government document. It was used in the brief of the so-called "trade-defendant intervenors" in this action.

In their memorandum brief, before the District Court they quote the Second Circuit opinon as follows: "The legislative history of section 810 demonstrates that termination of subsidies was not considered a desirable by-product. *Safir* v. *Gibson*, 417 F.2d at 97." The quote as the opinion properly reads as follows: "The legislative history demonstrates that termination of subsidies was not designed to be a purely penal measure, although quite likely

the punitive effect was considered a desirable by-product." The importance of this wishful revision can not be overlooked because the crux of the "mitigation" argument is the "penal" characterization of the command of section 810.

This misquotation of the Second Circuit opinion spotlights the inapplicability of the mitigation concept altogether. Seen in this light not only is the inducement of certain Department of Defense officials in the illegal action irrelevant, but the penalty formulae concocted out of misleading euphemisms, such as "mitigated recoveries of subsidy" only compound the capriciousness of the order of the Secretary of Commerce, (see Appendix E, page 58a).

A revealing aspect of the Secretary's dilemma can be found in his frank answer to the subsidized violators in a United States District Court action against him CADC No. 74-1788 (see Appendix I, page 62a). When he defends his action against these violators, he is in complete agreement with this petitioner's position. His answer to the complaining violators states: ". . . by characterizing defendants' orders requiring a recovery of public subsidy money as working a forfeiture or 'penalty' of money 'earned', plaintiffs' materially misstate the true facts. Although plaintiffs use such terms throughout their complaint, this allegation will not be repeated." (App. J. p. 73a).

The Secretary apparently found his own "mitigated recovery of subsidies paid" a better if misleading euphemism for an illegal penalty assessment. Nonetheless, one can not mitigate recovery of unearned government funds illegally disbursed without leaving in the pockets of the violators moneys belonging to the public treasury. His peremptory command "This allegation will not be repeated." apparently was to apply only to Docket 74-1788

and not to the action brought by this plaintiff in Docket 74-1474 in the District Court, District of Columbia where the record is replete with the Secretary's and the intervenor's use of the words "penalty" and "forfeiture" for months after this January 3rd, 1975 protest.

III. The Secretary Of Commerce Has Not Fulfilled His Duty To Petitioner.

Petitioner submits that there are no grounds consistent with section 810 of the statute which would grant the Secretary of Commerce, after a finding of violation, any discretion to refuse to invoke and implement the Operating Differential Subsidy Agreement (ODSA articles II-21(f), II-30, II31) withholding subsidies and declaring the carriers in default and to refer the case to the Attorney General of the United States to recover the subsidies falsely claimed by instituting suit against the violators on behalf of the United States and the relator-victim.

In the case at bar, a finding of violation of section 810 came about on the information of and at the behest of the victim of the violation. And the law of the case, if such there be, is that the Secretary of Commerce is under a Court mandate in two Circuits to consider the victim's competitive interest in re-entering the shipping business. Further, the Court of Appeals for the District of Columbia Circuit has held that, Congress intended a victim would profit through recovery of illegally-paid subsidies. And under 28 U.S.C. Section 1361, the Secretary of Commerce has a duty to the plaintiff-victim, i.e. an obligation to withhold subsidy payments, declare the carriers in default and seek recovery in the District Court. *Petitioner to this day rejects the proposition in Safir I that current subsidy payments are mandatory while recovery amounts are adjudicated.*

Neither Court of Appeals in their concern for the victim has however, pointed to any statute which could accommodate the implementation of such re-entry. The only statute affording such relief to both the victim and the government is Title 31, U.S.C. 231, 232, 235.

The United States is not an uninjured party in this case, but is instead a major injured party. As the Second Circuit stated in Safir I, "Even if the victim is successful in a treble damage suit against the violator, his recovery does not correct the evil at which section 810 was aimed, namely that public moneys have been used to assist some citizens to hurt otehrs in a *manner inimicable to the interest of the United States.* Nor is the sum sought to be exacted grossly disproportionate to the actual damage because the sum is less than the damages to the United States when a percentage of the recovery must be paid to the party at whose behest the fraud was uncovered (*United States ex rel. Marcus* v. *Hess.* 317 U.S. 537-561; *United States* v. *Griswold*, 24 F. 366).

Reasons for Granting the Writ

Certiorari should be granted because important questions of Federal law in the administration of the Federal Ship Subsidy Program have arisen which have not been, but should be, settled by this Court.

Sec. 810 of the Merchant Marine Act, 1936, 46 U.S.C. Sec. 1227 has never been construed or applied by this Court. This case is one of first impression. Judge Friendly (Safir I (1969):

> ". . . It is unfortunate—though not surprising—that Sec. 810 does not deal expressly with a situation where the Maritime Administrator refuses to take steps concerning subsidy payments to violators; since it does not, we must analyze the statu-

tory scheme as a whole and the legislative history of the Act to arrive at a judgment of what Congress would have wanted done if this problem had occurred to it. . . ."

". . . We deal here with an issue requiring reconciliation of two conflicting statutory purposes—the general pjolicy of the act to build up the American Merchant Marine through subsidy payments and the direction of Sec. 810 for withdrawal of those subsidies when they are used to hurt rather than help." (*Contrast Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971) also App. B, pp. 29-32).

Eight years have passed and yet Judge Wright correctly restates in Safir III 1977 "The case is one of first impression."

Petitioner contends that the remand order in Safir III should be modified to direct the Secretary of Commerce to withhold subsidy payments past due and suspend subsidy payments currently accruing until he has set aside an amount equal to the subsidies, construction and operating, allocable to the period of violation and declare the contracts in default pending this eventuality.

The Secretary should be directed to refer the case for prosecution under Title 31, U.S.C. 231, 232, 235 for recovery of civil damages on behalf of the relator-victim and the United States and that the recovery of that portion which the courts deem the share of the relator-victim be directed to be re-invested in the American Merchant Marine.

It should be held by this Court:

(1) that the violators of Sec. 810, the intervenors-respondents must at least refund the subsidy payments they received during the eleven month period.

(2) that the Maritime Administrator does not have any discretion whatever to waive the recovery in whole or in part of any subsidy payments made while the carriers were violating the statute.

(3) that Section 810 states that two forms of conduct are unlawful:

(1) "to continue as a party to or to conform to any agreement with another carrier or carriers by water."

(2) "or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair."

The Solicitor General, in his brief in opposition to a petition for certiorari in Safir II 400 U.S. 850, agrees with petitioner's contention here that "the penalty created by section 810 is inflexible as it bars all subsidy payments for at least the period of violation." He also agrees therein that the violation was *willful* (App. R, p. 199a). He makes no distinction between violators who sat together at meetings where the offending rates were being voted on (see MSB findings in S-243 Appendix N, pp. 118a-123a), wherein the Board stated as to the "non-trade" lines: "It is clear that indirectly most of them saw the matter possibly spreading in terms of rate reductions and competition in their own area and achieved benefits in that such rate reduction did not spread to other areas. It is an *inadequate rebuttal by either non-trade or trade respondents that a finding of violation is precluded* because such respondents would have had to resign to avoid violating section 810, thereby breaking up the AGAFBO conference which allegedly the government desired to continue. *American subsidized operators can not be parties to unfair and unjustly discriminatory agreements against any other American flag operator covered by the provisions of section 810 without violating that section.*" (Also see footnote 18, pp. 120a-121a).

Judge Wright's decision which singles out the Secretary for his unwillingness to protect this petitioner's interest in his desire to re-enter the shipping business does not take into account that his own discretionary interpretation of the footnote precludes the Trial Judge on remand from rejecting the mitigation concept at the threshhold, and destroys section 810 as a deterrent to predation.

The sum of one half of one percent as in the case of the Secretary's recommended recovery, or five percent at the other end of the mitigation spectrum, are both miniscule sums to be returned to the donor, the United States government, when this "sick corrupt" industry, by its own admission, is paying illegal rebates to shippers and illegal campaign contributions to federal officials for favorable legislation and whose entire subsidy structure is being questioned as to its value to the United States under current circumstances (see appendix exhibit Y, p. 250a, Letter to Colleagues from Congressman Paul McCloskey, with enclosures).

The construction of section 810 by the Court of Appeals severely limits the operative efficacy of the sanctions in the statute to deter violators. At the worst, the offenders face only the possibility of a penalty or fine being levied, and at best having the proceeding mooted, if the victim does not bestir the authorities to action, thus the sanctions in section 810 become a dead letter instead of a viable weapon in the preservation of competition. Five of the intervenors settled for only $165,000. for their violations of the Shipping Act of 1916. This occurred only after this action was commenced, and after the first opinion of the Court of Appeals was announced in an eleventh-hour attempt to forestall the collateral estoppel effect of the FMC decision. This was five years subsequent to the violation. Seven more years have passed and additional moneys refunded

hastily and voluntarily by the trade lines as a result of the Secretary's order reach a total of less than 1.2 million dollars. During the eleven-month period of violation, they received $229,000,000, and since the violation to date they have received in excess of four billion dollars from the public fisc.

Petitioner prays that the writ of certiorari be granted so that the precise limits on the administrator's (Secretary's) discretion not to seek recovery of all the subsidies paid be decided by this Court and prior to remand. Without the answer to this question, petitioner would be subject to re-litigation in a judicial forum after nine years of litigation in administrative proceedings and appeals. This re-litigation would apparently not preclude even further remand to the new Secretary, since Judge Wright in Safir III suggests this as an option to the District Court Judge. (See opinion of Judge Wright, Exhibit A, page 17a). Without review by the Supreme Court rather than serve the purpose of Article III of the Constitution, the wearisome course that the remand plots would be violative of it. Section 810 of the Merchant Marine Act of 1936, in spite of its brief clear language, has run afoul of judicial and administrative interpretation to the point where "if a federal court is required to do all over again what the agency has done, the system of review violates Article III of the Constitution". (See Kenneth Culp Davis-Administrative Law Text, page 542).

Seven years ago counsel for this petitioner, in the first petition for certiorari, 400 U.S. 850, *cert. denied*, concluded the petition with a quote from *Crooks* v. *Harrelson*, 282 U.S. 55, 60, which in retrospect is more appropriate now than it was then.

> "Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they do not bear in order to escape consequences though to be absurd or to entail great hardship. But an application of the principle so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter."

CONCLUSION

The substantial questions of Federal law involved have never been decided by this Court. Their proper proper and authoritative resolution which only this Court can provide will result in meaningful enforcement of the statute. The petition for certiorari should be granted.

Respectfully submitted,

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Pro Se

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